UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Avista Corporation,	)	
Bonneville Power Administration,	)	
Idaho Power Company,	)	
Montana Power Company,	)	
Nevada Power Company,	)	Docket No. RT01-35-000
PacifiCorp,	)	
Portland General Electric Company,	)	
Puget Sound Energy, Inc.,	)	
Sierra Pacific Power Company	)	
_____	)	
	)	
Avista Corporation,	)	
Montana Power Company,	)	
Nevada Power Company,	)	Docket No. RT01-15-000
Portland General Electric Company,	)	
Puget Sound Energy, Inc.,	)	
Sierra Pacific Power Company	)	
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PETITION FOR REHEARING AND CLARIFICATION

Pursuant to Section 313(a) of the Federal Power Act and Rule 713 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.713, the above-captioned parties (collectively "Petitioners") respectfully request rehearing of the Commission's Order Granting with Modification, RTO West Petition for Declaratory Order and Granting TransConnect Petition for Declaratory Order issued on April 26, 2001 (hereinafter "Order").[1] The Petitioners seek rehearing and clarification of the portion of

[1] 95 FERC ¶ 61,114 (2001).

the Order summarily rejecting the "Agreement Limiting Liability among RTO West Participants,"[2] a comprehensive business risk allocation package negotiated between and among all stakeholders in the Northwest in an open and extensive collaborative effort.[3]

I. BACKGROUND

A. Procedural Background

On October 16, 2000, as supplemented on October 23, 2000, and amended on December 1, 2000, the Filing Utilities[4] submitted a proposal in Docket No. RT01-35-000 to form a regional transmission organization, RTO West. The October 23 filing, as supplemented and amended, included a general description of the proposed characteristics and functions of RTO West, including the governance structure, the rate structure proposal and the allocation of firm transmission rights by RTO West. The October 23 filing also included a request for a declaratory order for Commission approval of the form of Agreement Limiting Liability among RTO West Participants ("Liability Agreement") and various other agreements.[5] The October 23 filing, as supplemented, comprised RTO West's Stage 1

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[2] RTO West proposal, Attachment Y.

[3] Order, at 61,325 (stating "[t]he participants in the development of the RTO West Stage 1 proposal took part in an inclusive and wide ranging collaborative process. As a result of these efforts, the parties appear to have successfully overcome many obstacles to developing a well defined, detailed proposal. We commend the participants for these efforts.").

[4] The Filing Utilities include: Avista Corporation (Avista), Bonneville Power Administration (Bonneville), Idaho Power Company (Idaho Power), The Montana Power Company (Montana Power), Nevada Power Company (Nevada Power), PacifiCorp, Portland General Electric Company (PGE), Puget Sound Energy, Inc. (Puget Sound), and Sierra Pacific Power Company (Sierra Pacific).

[5] The petition for declaratory order also requested Commission approval of: (1) the RTO West Articles of Incorporation and Bylaws; (2) determination that the proposed scope and configuration of RTO

filing, which will be followed by a Stage 2 filing later this year. The Stage 2 filing will, assuming significant issues such as those addressed herein can be resolved, seek approval of the RTO West Tariff and other agreements which are currently being negotiated among the RTO West Participants.[6]

The Commission states that its April 26, 2001 Order provides "preliminary guidance" with respect to Governance, Scope and Configuration, and Liability of RTO West, and also states that "as further changes to [RTO West] proposals are submitted . . . for review, [the Commission] will afford all interested parties an opportunity to comment, and we will address remaining issues in a subsequent order."[7] The Petitioners seek rehearing of the preliminary guidance that the Order provides with respect to issues related to the allocation of business risk among RTO West participants. The Petitioners also seek clarification of the Order to ensure that they will have an opportunity to submit to the Commission further proposals that seek to allocate business risks in a manner that will encourage participation of transmission owners in RTO West. The Petitioners cannot emphasize enough to the Commission how significant the issues addressed by this Petition are to the future of RTO West. Moreover, the Petitioners believe the resolution of these business risk allocation issues on a commercially appropriate basis is critical to the continued development of RTOs throughout the nation.

West satisfies Order No. 2000; and (3) three of the Filing Utilities requested a finding that the concepts underlying the Transmission Operating Agreement and the Agreement to Suspend Provisions of Pre-Existing Transmission Agreements are acceptable. The instant petition for rehearing does not address these issues.

[6] Stage 2 is planned to include various forms of agreement among RTO West and market participants to implement the RTO West arrangements; a schedule of transfer charges; and the allocation of firm transmission rights.

[7] Order, at 61,324.

B. The Liability Agreement

The RTO West participants embarked upon an extensive public process to reach a regional consensus-based solution to the allocation of commercial risks among RTO West, its constituent members and the customers of RTO West, embracing completely the collaborative process envisioned by Order No. 2000. This collaborative process resulted in the Filing Utilities' proposal of a complete business risk package that was submitted to the Commission in this proceeding. The business risk package, as proposed, would allow RTO West to partially protect itself, and allow other participants to partially protect themselves from protracted liability disputes by adopting the essential terms of the currently effective and operative Agreement Limiting Liability Among Western Interconnected Systems (the "WIS Agreement") – which has limited the liability of electric system owners to each other in the Pacific Northwest for thirty years.

Largely due to the consensus decision-making process that RTO West undertook, the Liability Agreement proposed by the Filing Utilities does not reflect the preferences of each, or even any single, Filing Utility. However, the Liability Agreement does represent a broad regional consensus among transmission owners, state utility commissions, transmission customers and most market participants as to the preferred approach for allocating business risk among the RTO West stakeholders. The Liability Agreement also attempts to integrate into the RTO structure the *status quo* commercial risk allocation currently in place by importing provisions typically included in state-jurisdictional tariffs throughout the region. The Filing Utilities had submitted this proposal to the Commission to craft a business risk

management solution that will protect both utilities and their native loads from being exposed to significant new liability as a result of the creation of an RTO.[8]

C. Part IV Of The Commission's April 26, 2001 Order

In Part IV of the Order, the Commission addresses the Liability Agreement that RTO West proposes to incorporate in the Transmission Operating Agreement as a means to allocate business risk among RTO West participants. In responding to the concerns raised by the dissenting participants involved in the RTO West collaborative regarding the commercial risks agreement, the Commission rejected outright the Filing Utilities' proposal to incorporate the Liability Agreement into the Transmission Operating Agreement.[9] In rejecting the Filing Utilities' proposal, the Commission states that it was

> not making any determination regarding the merits of the liability provisions under applicable law. The RTO Participants have alternatives with respect to liability matters. As we have explained, there is nothing in the pro forma tariff that would preclude those entities from relying "on the protections of state laws, when and where applicable protecting utilities or others from claims founded in ordinary negligence" or intentional wrongdoing.[10]

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[8] The Liability Agreement was supported by the Regional Representatives Group ("RRG"), with few objections. Attached for Commission review as Exhibit A, is the August 28, 2000 Report To RRG from Subgroup A -- Insurance, Liability and Risk Management Legal Work Group listing the Subgroup's recommendations regarding these issues. The few objections that were filed with the Commission should not necessitate Commission rejection of the entire Liability Agreement. The Filing Utilities are understandably concerned that without rehearing or clarification by the Commission, their efforts to undertake an open and inclusive collaborative process to develop a workable, consensus-based, region-wide solution to business risk, as reflected in the Liability Agreement, would be completely undercut by the Commission's summary rejection of their many hours of work.

[9] Order, at 61,346-47.

[10] Order, at 61,347.

The Commission appears to rely exclusively on Order No. 888 and its progeny as its rationale for rejecting the Filing Utilities' business risk proposal. The Commission cites Order No. 888 for the proposition that the Commission has, in orders addressing terms and conditions of *pro forma* Open Access Transmission Tariffs ("OATT"), held it inappropriate "to require transmission customers to indemnify transmission providers in cases of negligence or intentional wrongdoing by the transmission provider."[11] Citing Order Nos. 888, 888-A and 888-B the Order states that "the *pro forma* tariff does not address, and was not intended to address, liability issues."[12] The Order also states that "transmission providers may rely on state laws, when and where applicable, protecting utilities or others from claims founded in ordinary negligence. . . .[T]he Commission has consistently rejected liability limitation provisions in tariffs involving open access transmission service."[13]

II. ARGUMENTS IN SUPPORT OF REHEARING AND CLARIFICATION

A. Summary Statement Of Errors

The Commission erred by: (1) failing to engage in reasoned decision-making; (2) incorrectly relying on Order No. 888 in the context of RTO formation; (3) incorrectly determining that RTO West will be able to rely on state law as an adequate alternative; and (4) issuing an overly-broad order with respect to the Filing Utilities' business risk allocation proposal.

B. The Order Does Not Constitute Reasoned Decision-Making

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[11] Order, at 61,346.

[12] Order, at 61,347.

[13] Id.

The Order, in rejecting entirely the proposed business risk allocation plan, contains the same boilerplate language the Commission has used in other orders regarding liability provisions included within RTO formation filings.[14] In this regard, the Commission seemingly fails to distinguish between the Filing Utilities' proposal and the other RTO proposals which have been reviewed by the Commission when, in fact, the Filing Utilities business risk allocation plan is considerably different from the various other liability provisions considered by the Commission to date.

The Commission offers no guidance on how the Petitioners should respond to the rejection of the Liability Agreement. Arguably, a workable business risk allocation plan is the most essential element in ensuring the viability of any RTO. Without any clarification from the Commission, other than the identical language used to reject other dissimilar liability provisions, Petitioners have no structure, basis or policy guidance from which to propose any alternative plan. The Order purports to offer "preliminary guidance" to the Filing Utilities yet fails to provide them with any reasoned or responsive feedback regarding a critically important issue.

Following the guidance of Order No. 2000, the RTO West Participants engaged in a comprehensive process lasting more than one year to frame and negotiate a collaborative solution for allocating business risk. The business risk proposal that was submitted is a broadly supported attempt to preserve the status quo (by adopting provisions from the WIS Agreement and importing liability provisions from state retail tariffs) in a manner that seeks to limit the exposure of both utilities and their

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[14] The cursory Commission response regarding the Liability Agreement is identical to the language in GridFlorida, LLC, 94 FERC ¶ 61,363 at 62,334 (2001) (order in which the Commission rejected various liability provisions contained within the Participating Owners Management Agreement of that RTO proposal).

native loads to the potentially significant new liability that would otherwise result from the creation of a region-wide RTO. In rejecting the Filing Utilities' proposal in its entirety, the Commission has turned its favored collaboration process on its head without offering any explanation.

C. The Commission's Reliance On Order No. 888 And Its Progeny Is Misplaced

The Order rejects in its entirety the negotiated commercial allocation of business risk among RTO West Participants that was embodied in the Liability Agreement submitted by the Filing Utilities.[15] However, the Order does not even acknowledge, let alone address, any of the many differences between the allocation of commercial risk among RTO stakeholders and the allocation of risk between an integrated utility transmission provider and a transmission customer under an OATT. The Order relies upon boilerplate language from cases under Order No. 888, as a justification to reject the Liability Agreement in its entirety. For these reasons, more fully described below, Petitioners respectfully maintain that the Commission's reliance upon Order No. 888 as the basis for its decision is misplaced.

1. The Creation Of RTOs Is A Fundamental Industry Restructuring Far Beyond The Scope Contemplated By Order No. 888

The Order relies on the statement that, under Order No. 888, the Commission has held that it is not appropriate "to require transmission customers to indemnify transmission providers in cases of negligence or intentional wrongdoing by the transmission provider."[16] As an initial matter, the Filing Utilities have yet to even file an RTO West transmission tariff against which Order No. 888's provisions

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[15] Order, at 61,346-47.

[16] Order, at 61,346.

could be measured. Nor does the Filing Utilities' business risk allocation proposal contain any indemnification provisions that would require transmission customers to indemnify RTO West in the case of a negligent act or intentional wrongdoing of RTO West. Thus, the Petitioners can find no connection between this language and the rejection of the proposal.

More importantly, however, the Order's use of boilerplate indemnification and liability language from Order No. 888 and its progeny constitutes a failure to recognize that the allocation of commercial risk among participants in an RTO is not limited to addressing the risk between a transmission provider and customer, as is the case under a typical Order No. 888 OATT. Several critical distinctions appear to have been overlooked in the Commission's decision-making.

First, regardless of whether the Commission adopted appropriate indemnification and liability policies under Order No. 888, Order No. 888 did not require the massive business restructuring, and the commensurate re-allocation of risk among the restructured commercial interests, which is required of RTO Participants. Order No. 888 simply required existing commercial entities to offer a new (in some cases) service, and to reorganize internally. In contrast to functional unbundling of transmission service under the OATT, Order No. 2000 requires actual unbundling of business structures and the creation of independent regional transmission operators to manage and operate the transmission systems of a variety of participating transmission owners across very large regions.[17] At the very least, "control" over significant assets is passed from the owner of those assets to another independent

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[17] Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 Fed Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 30,092 (2000), petition for review pending *sub nom*, Pub. Util. Dist. No. 1 of Snohomish County, Wash. V. FERC, Case Nos. 00-1174, et al. (D.C. Cir. Apr. 24, 2000).

business entity, the RTO. In many cases ownership itself will be conveyed, if not transfer of actual wires, certainly of operating systems and security software. This type of fundamental change in business relationships involves the potential for far more cross-liability than might arise, for example, even from the discriminatory provision of transmission service under an OATT. RTO restructuring requires reallocating business risk to address liability for service interruptions and to establish standards of service for a new range of unbundled services that will now be covered exclusively under a federal tariff.

To better understand the fundamental change an RTO brings to the current utility business structure, one need only consider that, typically significantly less than 10 percent of the power transmitted over the transmission facilities operated by a historically integrated utility is transmitted directly under a FERC-approved OATT. The remaining 90 or more percent of the power is transmitted to serve native retail load and is transmitted under, and governed by, a state-jurisdictional retail tariff. By contrast, under an RTO structure, a FERC-approved transmission tariff will govern 100 percent of the power transmitted over the facilities operated by an RTO. State retail tariffs typically contain continuity of service provisions (*i.e.*, continued service is not guaranteed) and appropriate limitations on liability for service interruptions. These state retail tariffs will not be applicable to any RTO service and FERC is refusing to permit comparable language in RTO tariffs. Therefore, RTOs would face a massive increase in potential liability if the protections currently included in state retail tariffs are lost.[18]

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[18] See also Part II, Section D of this Request for Rehearing and Clarification.

Second, unlike the typical bilateral allocation of risk between an integrated transmission-owning utility and a transmission customer under an OATT, RTO West must allocate commercial risk among a myriad of participants: the RTO itself (as the independent transmission system operator), the participating transmission owners (which include investor-owned utilities, municipal utilities, cooperatives, a federal power administration, etc.) and the transmission customers (both on the generation side and the load side). In particular, the allocation of business risk between an owner of transmission assets and a separate and independent operator of those assets is nowhere addressed or even contemplated by Order No. 888; yet Order No. 888 stands as the only justification in the Order for rejecting the Liability Agreement, which does address those issues.

Third, because of the broad geographic scope of RTO West envisioned by Order No. 2000, the RTO must allocate commercial risk among participants that are subject to various state laws (and, in the case of RTO West, federal statutes and potentially Canadian law). Having a uniform application of a business risk plan is a critical concern of the Petitioners that can only be addressed in the RTO formation documents.

Finally, there is a particular, and perhaps unique, concern in the Northwest due to the role that the Bonneville Power Administration (BPA) plays in the region. The RTO West proposal anticipates the inclusion of BPA and hopefully other public power and cooperative utilities. For two reasons, this is regionally critical since BPA currently owns and operates more than 75 percent of the high-voltage transmission assets in the region. First, BPA currently has available to it certain sovereign immunity defenses (*e.g.*, no tort liability for discretionary functions) not waived by the Federal Tort Claims Act

and procedural protections against liability which would not be available to RTO West should it become the operator of the federal transmission system.

Second, should a judgment be rendered against RTO West, participating transmission owners may be held jointly and severally liable due to their coordinated participation in RTO West. In that case, while BPA would retain its defenses to potential liability claims should a judgment be rendered against RTO West, the investor-owned utility participants would have no such defense and without a comprehensive commercial risk allocation package an undue burden of risk would be shifted to those investor-owned utilities.

2. The Actual Holding In Order No. 888 Is Much Narrower Than Recent Orders Assert And Is Of Limited Relevance To RTOs

In the Order, the Commission relies on Order No. 888 as a basis to reject the entire Liability Agreement. Petitioners request clarification of the Commission's policy regarding liability to reconcile the apparent contradiction between the Order and the Commission's articulation of its policy before the before the Court of Appeals for the District of Columbia Circuit. The D.C. Circuit summarized FERC's position that Order No. 888 does not prohibit all or any forms of limitation of liability, stating:

> FERC responds by denying that the indemnification provision adopts a particular liability standard at all. FERC claims that it has merely distinguished liability from indemnification, and that the change to the pro forma tariff does not establish a new, simple negligence standard of liability for transmission providers. Citing its own statements in Order 888-A, FERC asserts that the tariff's indemnification provision should not be construed as preempting state liability standards. *See* Order 888-B, ¶ 61,248 at 62,080-81. FERC maintains that, since the change to the indemnification provision does not represent a substantive alteration in policy or the standards governing legal liability, the Commission was not obligated to notify interested parties and seek comment.

Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 728 (D.C. Cir. 2000). If Order No. 888 did not change the Commission's policy or establish or preclude the establishment of a liability standard at all, the Commission should not have rejected the Liability Agreement based upon the rationale it stated in the Order: that "all of the Commission orders cited by RTO West Applicants . . . for the acceptance of liability limitation provisions predate Order No. 888."[19] If no changes were made to the Commission's liability policy, as the Commission argued to the D.C. Circuit, then it should be irrelevant that the orders cited by the Filing Utilities predate Order No. 888.

In Order No. 888-A, the Commission stated its preference for filing regional open access transmission tariffs and its view that the *pro forma* tariff would provide sufficient flexibility to accommodate the prevailing practices in the Pacific Northwest, stating:

> the [Order No. 888]*pro forma* tariff contains provisions allowing utilities to modify tariff terms to reflect prevailing regional practices. The Commission concluded that this should permit entities in the Pacific Northwest to address unique circumstances that exist in the Pacific Northwest and to incorporate prevailing regional practices . . . into their open-access transmission tariffs.[20]

In the Order, however, the Commission rejected in its entirety the Filing Utilities' proposal to incorporate prevailing regional business practices respecting liability in the RTO West formation documents. The Order implies that such prevailing regional practices were rejected because they were

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[19] Order, at 61,347 (citations omitted); see also, Filing Utilities' Answer to Motions to Consolidate and Request for Leave to File Answer to Protests to the RTO West October 23, 2000 Filing, pp. 33-34, December 5, 2000.

[20] Order No. 888-A at 30,449.

incompatible with the *pro forma* tariff. Petitioners therefore request clarification of the Order to reconcile the apparent contradiction in Commission policy.

In this case, the Filing Utilities followed the Commission's guidance regarding liability set forth in Order No. 2000-A:

> We continue to believe that liability issues should be addressed on a case-by-case basis. We agree. . . that it is important that issues concerning liability and how liability provisions can or cannot be changed over time should be addressed during the collaboration process and resolved before the RTO begins operation. In this regard, a public utility can seek a declaratory order or make a filing and have the liability issues resolved before the commencement of operations.[21]

These considerations of risk allocation in an RTO are neither contemplated in nor addressed under the dictates of Order No. 888. The Filing Utilities' proposal of a comprehensive business risk package, that includes the Liability Agreement at issue in the instant proceeding, does not arise in the context of an OATT filing under Order No. 888. The functional and operational differences between the formation of an RTO and the provision of transmission service under an OATT pursuant to Order No. 888, while too numerous to fully describe herein, make these risk allocation issues essential to resolve to eliminate a large barrier to RTO formation. The Petitioners respectfully suggest that the Commission has erred to the extent it relied on Order No. 888 as a basis to reject the Liability Agreement.

Given the Commission's stated preference to address liability issues on a case-by-case basis, the Petitioners respectfully request that the Commission reconsider its outright rejection of the Filing Utilities' Liability Agreement on the grounds that it does not conform with the Commission's policy

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[21] Order No. 2000-A, III FERC Stats. & Regs. ¶ 31,092 at 31,373 (2000), petitions for review pending sub nom., Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC, Case Nos. 00-1174, et al. (D.C. Cir. Apr. 24, 2000).

post-Order No. 888. Petitioners reiterate their request to the Commission to address the allocation of business risk, including liability issues, in a manner that will allow the Filing Utilities the opportunity to move forward and implement an effective RTO.

D. Contrary To The Commission's Order, RTO West Will Be Unable To Rely On State Law Protections

In the Order, the Commission states that:

> [t]he RTO Participants have alternatives with respect to liability matters. As we have explained, there is nothing in the pro forma tariff that would preclude those entities from relying on "the protections of state laws, when and where applicable protecting utilities or others from claims founded in ordinary negligence" or intentional wrongdoing.[22]

Unlike the typical integrated utility that provides transmission service to a customer under an Order No. 888 *pro forma* OATT, the structure of an RTO precludes reliance exclusively on state law to protect utilities and others from claims founded in negligence and wrongdoing.[23]

To evaluate liability protections available under state law, the general and most fundamental premise of commercial transactions is that entities are able to delineate an allocation of risk in their contracts; and provided such contract terms do not offend the state law, such terms will govern business risks in the transactions thereunder. Any consideration of state law liability protections,

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[22] Order, at 61,347.

[23] While not central to this rehearing petition, the Filing Utilities would also encourage the Commission to reconsider its Order No. 888 position regarding limitations of liability in an RTO open access tariff context. As an increasing percentage of transmission grid usage comes under exclusive Commission jurisdiction, there are more significant social policy and rate impacts associated with the Commission's position than the Commission has acknowledged.

therefore, would start with an evaluation of the commercial agreements between the parties, whether bilateral contracts or tariffs.

In implementing Order No. 888 *pro forma* tariffs, the Commission has deferred to the jurisdiction of states over terms and conditions of retail tariffs, which allocate risk between retail customers and transmission providers. State-jurisdictional retail tariffs have historically incorporated the protections of state law through continuity of service standards, limitations of liability and other provisions consistent with state contract law. The Commission's exclusive reliance on state law to address liability, however, is a rationale that is misapplied in the context of an RTO, which will not be providing any transmission service under state retail tariffs. Rather, all of the transmission service provided by the RTO will be subject to exclusive federal jurisdiction, because all of the power will be transmitted across the RTO's system under FERC-approved transmission tariffs. Therefore, an RTO will not have the benefit of whatever liability protection may be included in a state-jurisdictional retail tariff. Moreover, if the Commission prevents the RTO participants from negotiating any agreement to allocate business risks, the RTO could essentially be subject to unlimited liability even as to consequential damages for service interruption events. The potential damages are enormous and could be catastrophic for any RTO, and potentially its "deep pocket" participants.

In essence, the RTO West Participants' consensus business risk proposal submitted by the Filing Utilities sought to follow Commission guidance and to apply the *status quo* state law protections that have been historically afforded to transmission owners under state jurisdictional retail tariffs. Typically state law permits certain limitation on liability (states generally do not permit waiver of liability for gross negligence or willful misconduct and the Liability Agreement does not propose such a waiver,

see Garrison v. Pacific Northwest Bell, 608 P.2d 1206, 1211 (Ore. Ct. App. 1980)) where these limitations are adopted and overseen by a regulating agency.[24] If the Commission is, in fact, requiring RTOs to rely on traditional state law liability protections, it must reconsider its Order to provide clarification and substantive guidance to RTOs on how to incorporate such protections in its agreement

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[24] See, e.g., Danisco Ingredients USA, Inc. v. Kansas City Power & Lt. Co., 267 Kan. 760, 769 (1999) ("Generally, other jurisdictions have held that rules promulgated by public utilities which absolve them from liability for simple negligence in the delivery of their services are reasonable and will be upheld.") (citing Pilot Industries v. Southern Bell Tel. & Tel. Co., 495 F.Supp. 356, 361-62 (D.S.C. 1979); Olson v. Mountain States Tel. & Tel. Co., 119 Ariz. 321, 323, 580 P.2d 782 (Ct.App.1978); Professional Answering Serv. v. Chesapeake Tel., 565 A.2d 55, 63-65 (D.C.1989); Landrum v. Florida Power & Light Co., 505 So.2d 552, 554 (Fla.Dist.App.1987); Southern Bell Tel. Co. v. Invenchek, 130 Ga.App. 798, 800, 204 S.E.2d 457 (1974); In re Ill. Bell Switching, 161 Ill.2d 233, 244, 204 (1994); Computer Tool & Engineering v. NSP, 453 N.W.2d 569, 573 (Minn.App.1990); Warner v. Southwestern Bell Telephone Company, 428 S.W.2d 596, 601-02 (Mo.1968); Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 108-09, 825 P.2d 588 (1992); Lee v. Consolidated Edison, 98 Misc.2d 304, 306, 413 N.Y.S.2d 826 (1978); Garrison v. Pacific NW Bell, 45 Or.App. 523, 531-32, 608 P.2d 1206 (1980); Behrend v. Bell Tel. Co., 242 Pa.Super. 47, 74-75, 363 A.2d 1152 (1976), vacated 473 Pa. 320, 374 A.2d 536 (1977), reinstated 257 Pa.Super. 35, 390 A.2d 233 (1978); Southwestern Bell Telephone Co. v. Rucker, 537 S.W.2d 326, 331-32 (Tex.Civ.App.1976).

A number of states have acknowledged that these limitations have a direct relationship to lower rates. See Houston Lighting & Power Co. v. Auchan USA, Inc., 995 S.W.2d 668, 673 (1999) (citing Cole v. Pacific Tel. & Tel. Co., 112 Cal.App.2d 416, 246 P.2d 686, 688 (1952); Landrum v. Florida Power & Light Co., 505 So.2d 552, 554 (Fla.Dist.Ct.App.1987); Southern Bell Tel. & Tel. Co. v. Invenchek, Inc., 130 Ga.App. 798, 204 S.E.2d 457, 460 (1974); In re Illinois Bell Switching Station Litig., 161 Ill.2d 233, 204 Ill.Dec. 216, 641 N.E.2d 440, 446 (1994); Singer Co. v. Baltimore Gas & Elec. Co., 79 Md.App. 461, 558 A.2d 419, 427 (1989); Wilkinson v. New England Tel. & Tel. Co., 327 Mass. 132, 97 N.E.2d 413, 416 (1951); Computer Tool & Eng'g, Inc. v. Northern States Power Co., 453 N.W.2d 569, 573 (Minn.Ct.App.1990); Montana ex rel. Mountain States Tel. & Tel. Co. v. District Court, 160 Mont. 443, 503 P.2d 526, 528-29 (1972); Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 825 P.2d 588, 590-91 (1992); Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co., 99 N.M. 796, 664 P.2d 994, 998-99 (App.1983); Lee v. Consolidated Edison Co., 98 Misc.2d 304, 413 N.Y.S.2d 826, 828 (1978); Behrend v. Bell Tel. Co., 242 Pa.Super. 47, 363 A.2d 1152, 1165 (1976), vacated and remanded, 473 Pa. 320, 374 A.2d 536 (1977), aff'd on remand, 257 Pa.Super. 35, 390 A.2d 233 (1978); Allen v. General Tel. Co., 20 Wash.App. 144, 578 P.2d 1333, 1337 (1978)).

absent the protections incorporated in state-jurisdictional retail tariffs. Unless the Commission approves limitations on liability comparable to those prevalent in state tariffs, there will be a net increase of liability that will have to result in a significant increase in rates.

To better understand the significance of these issues, the Petitioners urge the Commission to begin a dialogue with all stakeholders, including particularly insurance providers that may be called upon to provide coverage for RTOs and their participants, regarding the commercial and rate impacts of the Commission's current direction. Petitioners believe, based upon their investigations to date, that it would be extremely expensive, if not impossible, to obtain adequate insurance for an RTO to cover the limitless consequential damages liability exposure from major service interruptions that would result from the Commission permitting no limitations of liability tariff provisions.

On May 24, 2001, Petitioners attended a noticed public technical conference with Commission staff and other interested participants to discuss the liability issues that have arisen in the formation of RTO West and also in other RTOs.[25] Petitioners have attached for Commission review Exhibits B and C hereto, their presentation materials regarding allocation of business risk. Petitioners thank the Staff for their attention and willingness to discuss these important issues that have imposed significant barriers to RTO formation. At the technical conference, it became evident that reliance upon state laws to allocate business risk among RTO participants is fraught with uncertainty and the potential of uneven and inequitable outcomes.

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[25] Notice of Technical Conference, May 11, 2001, Docket Nos. RT01-35-000 and RT01-15-000.

Petitioners urge the Commission to reconsider its Order and to explore other options for opening a dialogue with all of the participants that are currently attempting to resolve these business risk allocation issues that have emerged as a barrier to the effective formation of RTOs under Order No. 2000.

E. The Commission's Decision Is Overbroad In Its Summary Rejection Of The Entire Liability Agreement

The Commission erred by rejecting the entire Liability Agreement. In support of its decision, the Commission states that it has "consistently rejected liability limitation provisions in tariffs involving open access transmission service."[26] However, the cases cited by the Commission refer to the allocation of liability between a transmission customer and a transmission provider. The risk allocation plan proposed by the Filing Utilities contemplates new relationships resulting from the formation of an entity whose primary purpose is to operate the transmission facilities of other owner utilities.

An OATT, by its own terms and conditions, relates solely to the relationship between a transmission provider and the transmission customers. A risk allocation plan, *i.e.* the Liability Agreement, attempts to manage various other relationships that will be created due to the formation of an RTO that the OATT does not consider. The contractual relationship established when a transmission owner transfers operational control of its transmission facilities to an RTO must include

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[26] Order, at 61,347 citing Arizona Public Service Co., 94 FERC ¶ 61,027 at 61,082 (2001); New York Independent System Operator, Inc., 90 FERC ¶ 61,015 at 61,034, order on reh'g, 91 FERC ¶ 61,012 at 61,051 & n.23 (2000); Pacific Gas & Elec. Co., *et al.*, 81 FERC ¶ 61,122 at 61,520-21 (1997).

liability provisions or it is likely that many transmission owners will be unwilling to transfer operational control. Yet the Order rejected these provisions as contained in the Liability Agreement.

Historically, a transmission owner provided transmission service over its own transmission system to its own customers. Once the transmission owner transfers operational control of its facilities to an RTO, however, the RTO will provide transmission service over the transmission owner's system, and all other participating transmission owners' systems, to the RTO's customers. In transferring control to the RTO, the transmission owner is no longer the decision-maker with respect to its own transmission facilities, yet it may remain at risk as an owner for the RTO's decisions regarding its system. Additionally, the number of customers, and possible plaintiffs, increases along with the total dollar amount of possible judgments. Among the serious concerns of Petitioners is the risk that plaintiffs will have an incentive to seek judgment against a participating investor-owned utility for 100 percent of the liability imposed upon an RTO that cannot limit its liability, since the non-profit RTO itself will be essentially unable to satisfy any money award that exceeds any insurance it may be able to acquire and federal and state governmental participating transmission owners for the most part have additional sovereign immunity defenses.

The Commission's blanket rejection of the Liability Agreement does not provide Petitioners with any understanding of the Commission's concerns regarding risk allocation or any guidance on a more suitable risk allocation plan. In addition, Petitioners must be given the opportunity to more fully explain the goals and principles of a risk allocation plan which would meet the needs of the Commission and of the potential divesting or participating transmission owners. By not allowing the Filing Utilities to address an appropriate allocation of liability, the Commission may either impose unreasonable liability

risks on those entities attempting to voluntarily form RTO West or impose significant rate increases upon the region to cover insurance costs, assuming that insurance would be available. These utilities must consider with the utmost care whether to subject their investors to such elevated economic risk or their ratepayers to significant rate increases. As a result of its decision, the Commission has rejected essential provisions of the Filing Utilities' proposal in an overly-broad manner and placed at risk development of a viable RTO formation plan.

IV. CONCLUSION

The Commission should grant the rehearing request, reconsider its outright rejection of the Liability Agreement or otherwise make it clear that Petitioners are free to re-address this decidedly important issue in subsequent filings. Petitioners suggest that the Commission has many options apart from accepting outright the proposed Liability Agreement included in this filing; however, the Filing Utilities must be given the opportunity to file an alternate risk allocation plan that can be developed with some substantive guidance from the Commission. If the Commission fails to allow the Filing Utilities to specify the risk allocation at the onset of the formation of RTO West, certain entities will most assuredly decide not to participate in the RTO. Indeed, if the Commission decides not to reconsider the appropriate role of liability allocation provisions as they pertain in an RTO context, RTO development across the nation will be adversely affected. This is not an issue that is specific to the Northwest; the GridFlorida Applicants have addressed the same issue in their rehearing request of the GridFlorida order and other RTOs are known to be struggling with the issue. Petitioners submit that this is a

paramount and complex issue that threatens RTO development unless and until it receives reflective and comprehensive attention by this Commission.

The Petitioners strongly urge the Commission to open an appropriate forum for a full airing of the views on all sides of this important matter. To this end, the Petitioners propose that the Commission convene a settlement conference, a technical collaboration, or some other type of broad policy development proceeding in which investor-owned utilities, municipal and public power entities, RTO proponents, state commissions, transmission customers and the insurance industry may all provide guidance to the Commission regarding this essential element of RTO formation. The continued failure of the Commission to consider the commercial implications of this issue may well delay or seriously harm its RTO program.

Respectfully submitted
on behalf of Petitioners,

Gary D. Bachman
Andrew B. Art
Evan C. Reese
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1880

May 29, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 29th day of May 2001.

_____

Andrew B. Art
Van Ness Feldman, P.C.
1050 Thomas Jefferson St. N.W.
Washington, DC 20007-3877
(202) 298-1800